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In the Supreme Court of the United States

OCTOBER TERM, 1933

No. 435

SANTOS MIGUEL, PETITIONER

v.

J. RAYMOND MCCARL, AS COMPTROLLER GENERAL of the United States, and Frederick W. Coleman, as Chief of Finance, United States Army

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

BRIEF FOR THE RESPONDENT, COMPTROLLER GENERAL OF THE UNITED STATES, IN OPPOSITION

OPINION BELOW

The memorandum opinions of the Supreme Court of the District of Columbia (R. 8–9, 25) and the final decree for injunction entered by that court (R. 25–26) are not reported. The opinion of the Court of Appeals of the District of Columbia (R. 32–38) is reported in 61 Wash. L. Rep. 637–639, — Fed. (2d) —.

JURISDICTION

The judgment sought to be reviewed was entered in the Court of Appeals of the District of Columbia on June 26, 1933 (R. 39). The petition for certiorari was filed September 6, 1933. Petitioner invokes the jurisdiction of this court under section 240 (a) (c) of the Judicial Code as amended by the act of February 13, 1925, 43 Stat. 938–939.

QUESTION PRESENTED

I. General Question

Whether injunction lies in the Supreme Court of the District of Columbia to compel payment of a claim against the United States which the Comptroller General of the United States has decided is not authorized to be paid under existing appropriations, in the absence of an appropriation made specifically for payment of that identical claim.

II. Specific Question

Whether injunction lies in the Supreme Court of the District of Columbia to compel the Chief of Finance, United States Army, to cause payment to be made and to compel the Comptroller General of the United States to approve payment of retired pay and allowances to a former enlisted man of the Philippine Scouts after the Comptroller General of the United States, on an application for decision by an Army disbursing officer before whom a voucher covering such claim for retired pay and

allowances was pending for payment, has rendered his decision holding that such payment is not authorized under existing appropriations.

STATUTES INVOLVED

In note 2, case of *United States ex rel. Skinner & Eddy Corporation* v. *McCarl, etc.*, 275 U.S. 1, 4–5, this Court recently has summarized the pertinent statutes and stated the jurisdiction of the respondent, Comptroller General of the United States, thereunder, as follows:

> The accounting branch of the Treasury Department was created by the Act of September 2, 1789, c. 12, §§ 1, 3, 5, 1 Stat. 65, 66. Steps in its growth and in the development of its control over Government expenditures may be traced in the Acts of May 8, 1792, c. 37, § 1, 1 Stat. 279; July 16, 1798, c. 85, § 1, 1 Stat. 610; March 3, 1817, c. 45, §§ 1, 3–5, 3 Stat. 366, 367; May 7, 1822, c. 90, 3 Stat. 688; March 30, 1868, c. 36, 15 Stat. 54; June 8, 1872, c. 335, §§ 21–25, 17 Stat. 283, 287–288. In 1894 there was a general revision of the statutes dealing with the accounting officers. Act of July 31, 1894, c. 174, 28 Stat. 162, 205–211. The powers and duties there outlined were in the main those transferred to the General Accounting Office by the act of 1921. The question of the jurisdiction of the Comptroller General is not a question as to bookkeeping merely. *The decision of the Comptroller General upon the allowance of*

accounts within his jurisdiction is conclusive upon the executive branch of the Government. Act of July 31, 1894, c. 174, § 8, 28 Stat. 162, 207, following the provisions of the earlier Act of March 30, 1868, c. 36, 15 Stat. 54. Save in cases where resort is had to the courts, therefore, the Comptroller is the final arbiter as to the legality of expenditures. * * * See *St. Louis, Brownsville & M. Ry. Co.* v. *United States,* 268 U.S. 169, 173–174. (Italics supplied.)

This Court had occasion to notice these statutes further in connection with other recent cases involving attempts to invoke mandamus or injunction to coerce the respondent, Comptroller General of the United States, to approve payment of claims against the United States in such amounts as the claimants conceived were due them: *United States ex rel L. Margulies & Sons, Inc.* v. *McCarl, etc.,* 56 App. D.C. 147, 10 F. (2d) 1012, certiorari denied 273 U.S. 696; *McCarl, etc., et al.* v. *United States ex rel Leland,* 59 App. D.C. 362, 42 F. (2d) 346, certiorari denied *United States ex rel Leland* v. *McCarl, etc., et al.,* 282 U.S. 839; *Richmond, Fredericksburg & Potomac R. Co.* v. *McCarl, etc.,* 61 App. D.C. 290, 62 F. (2d) 203, certiorari denied 288 U.S. 615. In the leading case of *United States* v. *Lynch* (1890), 137 U.S. 280, involving a petition for mandamus to coerce the Fourth Auditor and the Second Comptroller of the Treasury to approve payment of a claim of a Navy officer against the United

States, the statutes prior to the Dockery Act of 1894 and the Budget and Accounting Act of 1921 were noticed and construed by this Court. The recent case of *Lambert Lumber Co.* v. *Jones Engineering and Construction Co.*, 47 F. (2d) 74, certiorari denied 283 U.S. 842, contains a comprehensive review of the legislative history of the pertinent statutes.

The provisions of the statutes deemed particularly for consideration, together with notes on legislative history thereof, are printed in Appendix A, pp. 29–43, *infra*.

STATEMENT

The petitioner, Santos Miguel, a native Filipino, first enlisted in the *Philippine Scouts* October 1, 1901, and, under original and subsequent enlistments, served continuously in that organization until October 31, 1931. (The statements in the petition (p. 7) that petitioner "first enlisted October 1, 1901, in the United States Army * * *" and that petitioner "reenlisted in the Army" are inaccurate. The enlistment was in the Philippine Scouts. The distinction is material. R. 10–11.)

Paragraph 35, War Department Special Orders, No. 207, dated September 3, 1931, announced respecting the petitioner as follows:

> 35. Master Sergeant Santos Miguel, R-320883, Service Company, 45th Infantry (PS), will be placed on the retired list at Fort William McKinley, P.I., effective Oc-

tober 31, 1931, and will be sent to his home. The travel directed is necessary in the military service.

By order of the Secretary of War.

DOUGLAS MACARTHUR,

General,
Chief of Staff.

A voucher subscribed by Major Benj. L. Jacobson, Finance Department, U.S. Army, covering the petitioner's claim for retired pay was transmitted by the disbursing officer before whom the voucher was pending for payment, Major S. R. Beard, a bonded Army Finance Officer, Headquarters Philippine Department, to the respondent, Comptroller General of the United States, through the Chief of Finance, on November 5, 1931, with a request for decision as to whether payment on the voucher was authorized, as follows:

Subject: Retired pay.

To: Comptroller General of the United States, (through Chief of Finance, Washington, D.C.).

1. *The accompanying voucher* covering retired pay of Master Sergeant Santos Miguel, R-320883, Service Company, 45th Infantry (PS), *is forwarded with request for an advance decision as to the legal authority for payment.* (Italics supplied.)

2. Reasonable doubt exists as to the authority of the Secretary of War, under the provisions of the act of February 2, 1901, as amended by act of May 10, 1926 (44 Stat.

496), to authorize retirement and fix the retired pay and allowances of enlisted men of the Philippine Scouts, as prescribed in Section II, Circular 41, War Department, dated September 21, 1931, copy herewith.

3. The voucher referred to in paragraph 1 above was referred to the undersigned as disbursing officer, office of the finance officer, Philippine Department, Manila, for payment.

S. R. BEARD,
Major, F. D.,
Disbursing Officer.

This request from Major Beard for decision was forwarded to the Comptroller General from the War Department on December 16, 1931, by 1st Ind., which, in pertinent part, is as follows:

241.18-FAA (Miguel, Santos) #R-320883.

[1st Ind.]

WAR DEPARTMENT, OFFICE CHIEF OF FINANCE,
Washington, December 16, 1931.

To the COMPTROLLER GENERAL OF THE UNITED STATES,
Washington, D.C.

1. This request for advance decision is made under the authority contained in the act of July 31, 1894 (28 Stat. 208; U.S.C. 31:74). It is requested that such decision when rendered be forwarded to the disbursing officer, through this office. (R. 12–13.)

The respondent, Comptroller General of the United States, gave full consideration to the voucher and statements presented in support of the request for his decision, and also carefully considered the statutes and their legislative history governing the pay of the Philippine Scout organization, and considered also the opinions which had been delivered in reference to the status of the Philippine Scouts by and under former Secretaries of War and by the Government accounting officers, and considered the status of the Philippine Islands as an unincorporated territory of the United States and the status of the natives thereof, as well as the various appropriation acts which have made provision for pay and allowances; and he reached the conclusion that payment of *retired* pay and allowances to the petitioner, on the voucher presented, under existing appropriations of the public moneys, was not authorized. He thereupon rendered his decision to Major Beard through the Office of the Chief of Finance, Washington, D.C., as requested (R. 13). The decision, dated January 19, 1932, is published in printed form, 11 Comp. Gen. 275, and a copy thereof is attached to the answer of the Comptroller General as Exhibit A (R. 18–22). The decision is self-explanatory and recites certain of the doubts entertained by the Comptroller General relative to the validity of the petitioner's claim against the United States. The decision on the question presented by Major Beard having to

do with whether payment was authorized under existing appropriations appears in the concluding paragraph, as follows:

> *You are not authorized to pay the voucher,* which will be retained in the files of this office. (Italics supplied.)

The Secretary of War, on February 15, 1932, requested the United States Court of Claims to give its decision on the question of petitioner's right to be paid retired pay under existing appropriations, and the request has been assigned Departmental Reference No. 169 in that Court. (R. 17.) The letter of the Secretary of War filed in the Court of Claims, in pertinent part, is as follows:

> DEAR MR. CHIEF JUSTICE: Pursuant to the provisions of paragraph 148 of the Judicial Code, I hereby refer to the Court of Claims, with request for its decision * * * a claim * * * of Santos Miguel (appellee), a former enlisted man of the Philippine Scouts. * * *
>
> * * * * *
>
> On the 5th day of November 1931, Major Stephen R. Beard, Finance Department, U.S. Army * * * stationed at Manila, Philippine Islands, forwarded to the Comptroller General of the United States, requesting (under authority of sec. 8, act of July 31, 1894, 28 Stat. 208, and sec. 304, act of June 10, 1921, 42 Stat. 24) an advance decision by that official *as to his authority to pay the same,* a voucher in the amount of

> $50.81, evidencing the claim of the said Santos Miguel for his retired pay and allowances for the month of November 1931. *The Comptroller General, on January 19, 1932, rendered his advance decision to Major Beard, denying the latter's authority to pay said voucher,* and deciding that enlisted men of the Philippine Scouts are not entitled to retirement under the laws of the United States.
>
> *The War Department finds itself unable to accept or concur in this advance decision of the Comptroller General.* * * *
>
> I especially request the early consideration and decision of this matter by your honorable court. * * * (Italics supplied.)

The petitioner's bill of complaint for injunction in the present proceeding was filed April 27, 1932 (R. 1). The jurisdictional questions were raised by timely motions of the respective respondents to dismiss the bill of complaint (R. 6–8) and by the answer of the respondent, Comptroller General of the United States (R. 9–22).

In memorandum opinion of June 10, 1932 (R. 8–9), overruling respondent's motions to dismiss the bill, the Supreme Court of the District of Columbia decided the questions of law and fact it conceived as arising on the pleadings (Memo. Op. July 16, 1932—R. 25). That Court found that upon the request of the proper disbursing officer for decision whether he was authorized to make payment to the petitioner of retired pay the re-

spondent, Comptroller General of the United States, had ruled that enlisted men of the Philippine Scouts are not entitled to retired pay and that the disbursing officer was not entitled to make payment to him; also, that the purpose of the bill of complaint was to compel payment of such retired pay by the Chief of Finance, notwithstanding the decision of the Comptroller General of the United States, and to restrain the Comptroller General from interfering with such action; that is, to restrain the Comptroller General of the United States from applying the decision rendered on the disbursing officer's request, in the examination, adjustment and settlement of the account of the disbursing officer making payment, as the bill averred otherwise would be done. (Paragraph 6 of the Bill of Complaint—R. 3.)

On those findings, among others, the Supreme Court of the District of Columbia *held* (R. 9):

> I conclude that the motions to dismiss must be overruled for the following reasons:
>
> 1. *In my judgment* the Philippine Scouts are and since their organization have been a part of the Army of the United States. Enlisted men * * * of the Scouts are entitled to retirement after thirty years' continuous service.
>
> * * * * *
>
> Having found that the law authorized retirement I do not think the court is bound by the decision of the Comptroller General to the contrary.

2. The next question is that of appropriation.

> * * * *counsel for the Comptroller General argued that the appropriation does not exist,* * * *. Again I think this is a question of law upon which the court is not bound by the Comptroller General.* The appropriation is "for the pay of retired enlisted men." Having held that plaintiff is a retired enlisted man, I conclude that he comes within this language.
>
> 3. *It may be that plaintiff has a remedy in the Court of Claims. But having held that he is legally retired and that there is money available to pay him, I think* the duty of payment is a ministerial one, and that this court has authority to compel the performance of that duty. (Italics supplied.)

After this overruling of the motion of the respondent, Comptroller General, to dismiss petitioner's bill the said respondent filed his answer (R. 9–22) to the bill. The petitioner's motion to strike this answer was sustained July 16, 1932, in memorandum opinion of the Supreme Court of the District of Columbia (R. 25). Final decree for injunction thereupon was entered (R. 25–26) September 16, 1932, in pertinent part as follows:

> Adjudged, ordered, and decreed, that (1) the said motions by the respective defendants [respondents here] to dismiss the said bill of complaint be and the same are hereby overruled; and (2) the said motion by the

plaintiff [petitioner here] to strike out the said answers of the respective defendants be and the same hereby is allowed; and, the respective defendants having failed to file other answers or defense to the said bill of complaint within the time required by the rules of the court, but having elected to stand on their respective motions to dismiss and on their answers as filed, and having stipulated that a final decree be taken at this time, it is further

Adjudged, ordered, and decreed, that (1) the defendant, J. Raymond McCarl, Comptroller General of the United States, be restrained and enjoined from and against any and all interference with the defendant, Frederick W. Coleman, Chief of Finance, United States Army, to prevent the payment to plaintiff of the retired pay and allowances due him for the month of November, 1931, and for subsequent months, and that shall accrue to his credit hereafter; and that said defendant be enjoined and commanded to return forthwith to plaintiff's disbursing officer the voucher for his retired pay and allowances for the month of November, 1931, which voucher is now being retained in the files of the office of said defendant, and (2) the defendant, Frederick W. Coleman, Chief of Finance, United States Army, be and he is hereby enjoined and commanded to pay or cause to be paid to plaintiff the retired pay and allowances due him for the month of November, 1931, and subsequent months,

and to continue to pay or cause to be paid to him his retired pay and allowances in the manner in which and at the times when such pay and allowances are ordinarily paid to retired enlisted men of the Army.

The appeal to the District of Columbia Court of Appeals was from this final decree for injunction entered pursuant to the action of the Supreme Court of the District of Columbia sustaining petitioner's motion to strike the answer (R. 26) of the respondent, Comptroller General, the allegations of the bill not admitted in the said answer being taken as denied and the allegations of said answer being taken as admitted by the motion to strike, for purposes of the appeal.

Aside from the matters otherwise established on the record set forth above, the answer of the respondent, Comptroller General, establishes

(1) The procedure set forth in the regulations of the War Department, promulgated for the guidance of disbursing officers and other officials of that department in obtaining decisions from the Comptroller General of the United States on questions involving payments to be made by them or under them, was observed by the disbursing officer and the Chief of Finance in obtaining the decision on the petitioner's claim for payment (R. 14–15).

(2) *It has been the practice (which is undisputed and otherwise abundantly appears from the decided cases) of the Comptroller followed without interruption, at least since the act of March 30, 1868,*

15 Stat. 54, to decide every question of law and of fact necessary to be decided in determining whether a payment on a claim is authorized to be made under appropriated moneys of the United States, except in those rare cases where the Congress, by specific language, has made the finding or decision of some other official conclusive (R. 15).

(3) The claim of the petitioner covered by the present proceedings for retired pay and allowances had been pending before the United States Court of Claims over two months when the bill of complaint was filed in the court below on April 27, 1932, such claim having been referred on February 15, 1932, by the Secretary of War with the request that the Court of Claims decide the legal rights of the appellee to retirement and to retired pay and allowances, and, independently thereof, the petitioner has a plain, adequate, and complete remedy by a direct suit on his claim for retired pay and allowances in the Court of Claims (R. 17).

(4) The Comptroller General did not coerce or even invite the application of the disbursing officer and the Chief of Finance for an advance decision, nor has he interfered with the performance by them of their official duties (R. 12, 13, 15).

(5) The Chief of Finance does not function as a bonded disbursing officer (R. 16).

(6) The Comptroller General had no knowledge or information sufficient to form a belief (and the record contains no evidence) that the petitioner

applied to the President for retirement and was by direction of the President placed on the retired list (R. 10).

(7) The Congress has never specifically provided any appropriation authorized to be used for payment of retired pay and allowances to enlisted natives of the Philippine Scouts, and the War Department has never brought to the attention of the Congress in any formal official manner that the retirement of enlisted natives of the Philippine Scouts either was contemplated or had been accomplished (R. 16).

(8) No appropriated moneys are available to pay the petitioner retired pay and allowances (R. 16, 18).

(9) There has been no unlawful or improper failure, omission, or refusal to pay petitioner retired pay (R. 17).

The answer of the Comptroller General, moreover, categorically and repeatedly denied the allegations of the petitioner's bill of complaint that the petitioner is entitled to retired pay and allowances and the allegations and conclusions thereof that appropriated moneys of the United States are available and authorized to be used for making payment of such retired pay and allowances to the petitioner as well as the allegations and conclusions of the bill that the petitioner has been retired in accordance with existing laws and that he is entitled under the laws to retired pay and allowances as claimed by him (R. 10–18).

The interests of all parties impugning the correctness of the decision of the Court of Appeals of the District of Columbia were carefully and fully presented in both of the lower courts by able counsel. The chief counsel for the petitioner is a former acting Judge Advocate General of the Army. The counsel from the Office of the Judge Advocate General of the Army who appear on the record (R. 23) as counsel for the respondent, Chief of Finance, requested and were permitted to file elaborate briefs and to argue orally in both of the lower courts as *amici curiae* (Memo. Op. R. 8, and R. 31), presenting not only the reported views of the Secretary of War and Chief of Staff but, also, argument on behalf of the merits of the petitioner's claim against the United States, and in support of the contention that the questions presented to this court in the petition (p. 2) are necessarily for decision. Although petitioner's counsel of record filed only a *pro forma* brief of eight printed pages in the Court of Appeals of the District of Columbia the said counsel from the Office of the Judge Advocate General of the Army filed a printed brief, including exhibits, of 237 printed pages and supported the brief in oral argument (R. 31).

Both of the lower courts heard petitioner's counsel and counsel from the War Department (R. 8, 31) fully and patiently, yet neither of the lower courts found on the record the questions for decision which are stated in the petition (p. 2) to be for the decision of this Court.

The Supreme Court of the District of Columbia decided the legal merits of the petitioner's claim as against the United States, on the *ex parte* presentation made, then decided an appropriation was available to pay and directed the respondents to conform their official action to the court's decision (R. 8–9, 25–26).

The Court of Appeals of the District of Columbia in its opinion of June 26, 1933 (R. 32–39), reversing the decree of the Supreme Court of the District of Columbia and directing dismissal of the petitioner's bill for injunction, found the question presented by the record for decision (R. 33) to be substantially as stated herein (p. 2), namely, whether injunction lies to compel the respondent, Comptroller General, to approve and allow credit for payment of a disputed claim for retired pay and allowances against the United States, and sustained in every particular the separate brief thereon, prepared by counsel in the Office of the Comptroller General, under the direction and supervision of the United States Attorney for the District of Columbia, and filed in that court on behalf of the respondent, Comptroller General of the United States.

SUMMARY OF ARGUMENT

Numerous decisions of this Court are accepted to have settled that neither mandamus nor mandatory injunction may be invoked for the purpose of establishing a disputed claim for money, pen-

sion, or compensation against the United States, or of compelling payment thereof out of the public moneys. Those decisions are deemed controlling of the question which the record in the present case presents for decision. The Court of Appeals for the District of Columbia in its decision of June 26, 1933, not only fairly and impartially found the question arising on the record but, in the deciding thereof, correctly and properly gave effect to and applied the controlling decisions of this Court. In such view of the case no reasons are understood to obtain under Rule 38, paragraph 5 (c), of this Court, for granting review on writ of certiorari of the decision of the Court of Appeals for the District of Columbia.

ARGUMENT

The legislative branch of the Government maintains its constitutional control (article 1, section 9, clause 7) over the public moneys through the appropriation acts and the duly constituted accounting officers whose decisions, by the statutes, are made final and conclusive on the executive branch of the Government on questions involving the payment of claims and accounts within their jurisdiction. The legislative and, also, the judicial branch of the Government have been alert to make this control effective and to suppress the attempts which have been made at frequent intervals throughout the history of the Government to frustrate and nullify such control. The legislative history of the ac-

counting statutes set forth in Appendix A (pp. 29–43, *infra*) and the array of decided cases in this Court and the Courts of the District of Columbia involving applications for mandamus or mandatory injunction reflect the ingenious and plausible devices and arguments which have been relied upon by the promoters of such attempts.

The present proceeding for mandatory injunction is typical of such *ex parte* proceedings which have been instituted on claims against the United States with a view to obtaining a payment of money out of the Treasury of the United States without submitting the claims to free inquiry either where the merits are authorized to be examined and decided judicially (United States Court of Claims) or where the availability of an appropriation to pay is authorized to be determined (General Accounting Office) as between the claimant and the United States.

The decisions of this Court, rendered before the legislative branch established any forum wherein disputed claims for salary, compensation, etc., might be prosecuted to final judgment in an original proceeding against the United States, settled that mandamus or mandatory injunction may not properly issue to compel officers of the Government to approve and pay such claims. *United States* v. *Guthrie* (1854), 17 How. 284, 302–305; *Reeside* v. *Walker* (1850), 11 How. 272, 289–292; *Brashear* v. *Mason* (1848), 6 How. 92, 100–102; *Decatur* v. *Paulding* (1840), 14 Pet. 497. The rule of these

cases has not been modified since the passage of the Tucker Act (28 U.S.C. 250) authorizing prosecution of such claims to final judgment in a judicial proceeding directly against the United States. On the contrary this Court has confirmed unequivocally the correctness of the rule. *Hurley et al.* v. *Kincaid* (1932), 285 U.S. 95, 104; *United States* v. *Lynch* (1890), 137 U.S. 280, 283–287.

On May 10, 1932, the then Attorney General addressed a letter to the Secretary of War concerning his understanding as to the nature of the present proceeding in pertinent part as follows:

> There are many suits brought in the District and elsewhere against officers of the United States which involve matters in which the United States alone is really interested. *A suit against the Comptroller General and the Chief of Finance of the Army, the purpose of which is to compel the payment of money out of the public Treasury, is as much a suit against the United States as if the United States were named a party.* The officers named as defendants have no personal interest whatever in the controversy. It is the established practice in such cases for the Attorney General to take charge of the *defense* of such cases, the appearances for the defendant officials being made by the United States Attorneys.
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> * * * * *
>
> Under these circumstances it seems appropriate for me to confirm my oral request that the answer or return interposed for the

> Chief of Finance in the Miguel case by the officials of the Judge Advocate General's Department be withdrawn and that any answer or return required to be filed, be filed by the United States Attorney. *I am informed that the United States Attorney suggests that there are grounds on which this suit ought to be dismissed independent of the merits and that the return interposed for the Chief of Finance by the Judge Advocate General's office would seriously embarrass him in the position he has taken.* * * * (Italics supplied.)

Thereupon the answer referred to was withdrawn and on May 13, 1932, the United States Attorney for the District of Columbia filed a motion (R. 7–8), on behalf of the respondent, Chief of Finance, to dismiss the petitioner's bill of complaint, etc., similar to the motion which the United States Attorney theretofore had filed on May 4, 1932, on behalf of the respondent, Comptroller General of the United States.

The applicable principle which the Attorney General's cited letter of May 10, 1932, suggests is settled by decisions of this Court. Although the United States is not named a party, the action is one against the United States, where the individual respondents have no personal interest in the controversy, when the relief sought is against the named respondents only in their official capacity, and where the United States is "the only real party

against which alone, in fact, the relief is asked, and against which the judgment or decree effectively operates." *In re Ayers,* 123 U.S. 443, 506; *Belknap* v. *Schild,* 161 U.S. 10, 25; *Minnesota* v. *Hitchcock,* 185 U.S. 373, 386-387. The United States is an indispensable party if the action is one which may interfere with the performance of governmental functions and vitally affect interests of the United State. *Morrison* v. *Work,* 266 U.S. 481, 485–486; *Lambert Co.* v. *Balto. & Ohio R.R. Co.,* 258 U.S. 377, 383; *Hopkins v. Clemson College,* 221 U.S. 636, 642–643; *Oregon* v. *Hitchcock,* 202 U.S. 60, 68; *Belknap* v. *Schild,* 161 U.S. 10; *New York Guaranty Co.* v. *Steele,* 134 U.S. 230, 232.

A substantial right of the United States "cannot be tried behind its back" (*Louisiana* v. *Garfield,* 211 U.S. 70, 78) and the present proceeding fails under decisions of this Court by reason that the United States is not, and cannot be made, a party. *Louisiana* v. *McAdoo,* 234 U.S. 627, 628–629; *Goldberg* v. *Daniels,* 231 U.S. 218, 221–222.

The present proceeding likewise fails under section 267 of the Judicial Code, Act March 3, 1911, 36 Stat. 1163 (28 U.S.C. 384) which provides:

> Suits in equity shall not be sustained in any court of the United States in any case where a plain, adequate, and complete remedy may be had at law.

Aside from this controlling statute the rule declared is as old as the earliest period in the re-

corded history of English equity jurisprudence, and it is the general practice of courts of equity to dismiss a bill of complaint to recover realty, money, compensation, etc., if it be grounded merely on an alleged title: *Lewis* v. *Cocks*, 23 Wall. 466; *Killian* v. *Ebbinghaus*, 110 U.S. 568; *Litchfield* v. *Ballou*, 114 U.S. 190, 192; *Hurley et al.* v. *Kincaid*, 285 U.S. 95, 104; *McKee* v. *Rudolph*, 56 App. D.C. 207, 12 F. (2d) 148, certiorari denied, 273 U.S. 710; *Parkersburg* v. *Brown*, 106 U.S. 487, 500.

In the cited case of *Hurley et al.* v. *Kincaid*, decided *February 23, 1932*, 285 U.S. 95, 104, after both the District Court and the Fifth Circuit Court of Appeals seem to have disregarded the controlling force of this elementary rule in equity jurisprudence, and after a voluminous record had been built up, at great expense and effort on behalf of all parties, this Court reannounced this very plainly established rule, that equity could not entertain jurisdiction because there was an ample remedy at law, namely the right to recover compensation under the Tucker Act (24 Stat. 505) and that such remedy was plain, adequate, and complete.

In the more recent case of *Williams* v. *United States*, 289 U.S. 553, involving a claim of one of the judges of the United States Court of Claims for pay or compensation on the basis that he sat as a judge of a "constitutional" court, this Court (p. 560) said:

> Plaintiff is, and since November 11, 1929, has been, a judge of the Court of Claims of

> the United States. Since his entry upon the duties of his office, and until June 30, 1932, he received a salary at the rate of $12,500 per annum, as fixed by the Act of December 13, 1926, c. 6, §1, 44 Stat. 919. Since that date he has been paid at the rate of $10,000 per annum under a ruling of the Comptroller General of the United States. Compare *O'Donoghue* v. *United States,* decided this day, *ante,* p. 516.
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> * * * * *
>
> On February 8, 1933, this suit was brought in the Court of Claims to recover the amount of the difference between the statutory rate of $12,500, and the smaller amount paid under the ruling of the Comptroller General. The suit was brought by plaintiff in the court of which he is a member, *because,* as it is averred, *no other court or remedy was open to him:* * * * (Italics supplied).

The reserving, in the decisions by the respondent, Comptroller General, of the doubtful questions involved, for judicial decision in a direct proceeding against the United States, authorized under the Tucker Act, neither in that case nor in the present case resulted to prejudice any legal status or right of the claimants. *St. Louis B. & M. Ry.* v. *United States,* 268 U.S. 169, 173–174; *Longwill* v. *United States,* 17 Ct. Cls. 288, 291; *Major Collins's Cases,* 14 *id.* 568 and 15 *id.*, 22. Such reservation by the Comptroller General of doubtful questions for judicial determination did operate, however, to properly conserve and protect the interests of the

United States and the authority of the legislative branch over the public moneys. *Mullett* v. *United States,* 21 Ct. Cls. 485, distinguishing *McElrath* v. *United States,* 102 U.S. (12 Otto) 426. Also, to make all interested parties secure from possible future litigation which would have been necessary had payments been made not authorized by law. *Wisconsin Central Railroad Co.* v. *United States,* 164 U.S. 190; *United States* v. *Keehler,* 9 Wall. 83; *Heidt* v. *United States,* 56 F. (2d) 559, certiorari denied 287 U.S. 601; *Fidelity and Deposit Co. of Md.* v. *United States,* 55 F. (2d) 100; *United States* v. *Moore,* 168 F. 36, 24 L.R.A. (NS) 309; *United States* v. *Dempsey,* 104 F. 197.

After the respondent, Comptroller General, had ruled that payment of petitioner's claim was not authorized, all officers of the United States, and the petitioner as well, were chargeable with knowledge that the payment could not be made under existing appropriations and that the claim is not further for consideration in the executive branch of the Government. *Southern Pacific Co.* v. *United States,* 268 U.S. 263, 265; *Anderson's Case,* 59 Ct. Cls. 813, 61 *id.,* 201; 21 Op. Atty. Gen. (McKenna) 530, 531; 22 *id.,* 581; 23 *id.,* 431; *id.,* 586; 24 *id.,* 85; *id.* 553; 25 *id.,* 185; *id.,* 614; 26 *id.,* 431; *id.,* 609; 33 *id.,* 265 *id.,* 268.

The Court of Appeals for the District of Columbia not only has applied the decisions of this Court correctly in its decision of June 26, 1933,

directing dismissal of the petitioner's bill of complaint but throughout its history has correctly applied the decisions of this Court in other similar cases, examples of which are *Hurley, etc.*, v. *Shanley* (1932) App. D.C., 60 F. (2d) 335; *McCarl, etc. et al.*, v. *Rogers*, 60 App. D.C. 111, 48 F. (2d) 1023; *Same* v. *U.S. ex rel. Leland*, 59 App. D.C. 362, 42 F. (2d) 346; *Same* v. *Walters*, 59 App. D.C. 237, 38 F. (2d) 942; *U.S. ex rel. L. Margulies & Sons, Inc.*, v. *McCarl, etc.*, 56 App. D.C. 147, 10 F. (2d) 1012, certiorari denied, 273 U.S. 696; *Lochren* v. *Long*, 6 App. D.C. 486; *Seymour* v. *South Carolina*, 2 App. D.C. 240. An analogous question rarely arises outside the courts of the District of Columbia, but when it has arisen the decisions of this Court generally have been applied correctly. *James Howden & Co.* v. *Standard Shipbuilding Corporation* (C.C.A. 2), 17 F. (2d) 530, 532; *In re Departmental Reference No. 167*, 59 Ct. Cls. 813, 816.

CONCLUSION

The decision of the court below is correct. Not only does there appear to be no conflict of decisions but the principle involved has been settled repeatedly by this Court. We therefore do not believe that the case involves any question of sufficient general importance to merit review by this Court. The petition should be denied.

In view of what the Solicitor General has found it proper to state in the memorandum which he has

filed it is deemed appropriate to make available for the Court's examination in Appendix B, pp. 43–54, copies of the letters of September 14, 1933, and September 21, 1933, from the respondent, Comptroller General, to the Attorney General suggesting the interests of the United States and of the General Accounting Office involved in the case which were believed essential for bringing to this Court's attention.

Copies of the Attorney General's letter of September 16, 1933, and of the Solicitor General's letter of September 21, 1933, specially authorizing the filing of this brief in opposition are annexed, Appendix C, pp. 55–56.

Respectfully submitted.

R. L. GOLZE,
General Counsel,
HARRELL O. HOAGLAND,
Principal Attorney,
General Accounting Office
(*For the respondent, Comptroller General of the United States*).

OCTOBER 1933.

APPENDIXES

APPENDIX A

The act of July 31, 1894, 28 Stat. 206, 207–208, provided:

SEC. 7. Accounts shall be examined by the Auditors as follows:

* * * * *

"Second. The Auditor for the War Department shall receive and examine all accounts of salaries and incidental expenses of the Office of the Secretary of War and all bureaus and offices under his direction, all accounts relating to the military establishment, armories and arsenals, national cemeteries, fortifications, public buildings and grounds under the Chief of Engineers, rivers and harbors, the Military Academy, and to all other business within the jurisdiction of the Department of War, and certify the balances arising thereon to the Division of Bookkeeping and Warrants and send forthwith a copy of each certificate to the Secretary of War. (31 U.S.C. 72.)"

* * * * *

SEC. 8. The balances which may from time to time be certified by the Auditors to the Division of Bookkeeping and Warrants, or to the Postmaster General, upon the settlements of public accounts, shall be final and conclusive upon the Executive Branch of the Government, except that any person whose accounts may have been settled, the head of the Executive Department, or of the

board, commission, or establishment not under the jurisdiction of an Executive Department, to which the account pertains, or the Comptroller of the Treasury, may, within a year, obtain a revision of the said account by the Comptroller of the Treasury, whose decision upon such revision shall be final and conclusive upon the Executive Branch of the Government: *Provided,* That the Secretary of the Treasury may, when in his judgment the interests of the Government require it, suspend payment and direct the reexamination of any account.

* * * * *

All decisions by Auditors making an original construction or modifying an existing construction of statutes shall be forthwith reported to the Comptroller of the Treasury, and items in any account affected by such decisions shall be suspended and payment thereof withheld until the Comptroller of the Treasury shall approve, disapprove, or modify such decisions and certify his actions to the Auditor. All decisions made by the Comptroller of the Treasury under this Act shall be forthwith transmitted to the Auditor or Auditors whose duties are affected thereby.

Disbursing officers, or the head of any Executive Department, or other establishment not under any of the Executive Departments, *may apply for* and the *Comptroller* of the Treasury *shall render his decision upon any question involving a payment to be made by them or under them, which decision, when rendered, shall govern the Auditor and the Comptroller* of the Treasury *in passing upon the account* containing said disbursement. (31 U.S.C. 74.) (Italics supplied.)

These provisions of the Dockery Act of 1894 were amended by the Budget and Accounting Act of June 10, 1921, 42 Stat. 23–26, as follows:

SEC. 301. There is created an establishment of the Government to be known as the General Accounting Office, *which shall be independent of the executive departments and under the control and direction of the Comptroller General of the United States.* * * * (31 U.S.C. 41.) (Italics supplied.)

* * * * *

SEC. 304. *All powers and duties now conferred or imposed by law upon the Comptroller of the Treasury or the six auditors of the Treasury Department,* and the duties of the division of Bookkeeping and Warrants of the Office of the Secretary of the Treasury relating to keeping the personal ledger accounts of disbursing and collecting officers, *shall, so far as not inconsistent with this Act, be vested in and imposed upon the General Accounting Office and be exercised without direction from any other officer. The balances certified by the Comptroller General shall be final and conclusive upon the executive branch of the Government* * * * (31 U.S.C. 44.) (Italics supplied.)

* * * * *

SEC. 305. Section 236 of the Revised Statutes is amended to read as follows:

"SEC. 236. All claims and demands whatever by the Government of the United States or against it, and all accounts whatever in which the Government of the United States is concerned, either as debtor or creditor, shall be settled and adjusted in the General Accounting Office." (31 U.S.C. 71.)

* * * * *

SEC. 312. * * *

* * * * *

(c) The Comptroller General shall specially report to Congress every expenditure or contract made by any department or establishment in any year in violation of law. (31 U.S.C. 53c.)

These provisions of the Budget and Accounting Act of 1921, not only continue the provisions of previous accounting acts, making the balances certified by the Comptroller General conclusive in the executive branch of the Government, but establish the General Accounting Office "independent of the executive departments and under the control and direction of the [respondent] Comptroller General" (section 301) and provide that the duties vested in that office of examining and auditing claims and accounts and of deciding "any question involving a payment to be made" under the head of the War Department or any other executive department, etc., or by any disbursing officer thereof, "*shall * * * be exercised without direction from any other officer.*" (Italics supplied.)

The provisions cited from section 8 of the act of July 31, 1894, were substantially reenacted from the act of March 30, 1868, 15 Stat. 54. The legislative history of that act (39 Congressional Globe 218–219, 1117, 1404, 1421, 2073, 2082, and 2234) conforms with the Report of the Committee on Revision of Laws of February 16, 1869, in reference to a recommendation from the Secretary of War that the provisions of the 1868 act vesting such jurisdiction in the accounting officers should be repealed. The Report of the Committee on Revision of Laws

was reprinted in 26 Congressional Record, 4341–4342, in connection with the consideration of the provisions of the Dockery Act cited, to explain the legislative purposes in reenacting such provisions. The Committee Report, in pertinent part, is as follows:

ADJUSTMENT AND SETTLEMENT OF ACCOUNTS AGAINST THE GOVERNMENT

FEBRUARY 16, 1869.—Ordered to be printed and recommitted to the Committee on the Revision of the Laws

Mr. Poland, from the Committee on the Revision of the Laws, made the following report:

The Committee on the Revision of the Laws, to whom was referred a communication from the Secretary of War in relation to payments made by that Department under the provisions of an act passed March 30, 1868, and suggesting that said act be repealed or modified, have had the same under consideration, and report thereon as follows:

By the act of March 3, 1817, the offices of accountants in the War and Navy Departments were abolished, and it was provided that thereafter "all claims and demands whatever by the United States or against them, and all accounts whatever in which the United States are concerned, either as debtor or creditors, shall be settled and adjusted in the Treasury Department."

This act provided for the appointment of an additional comptroller and four auditors, making in all two comptrollers and five auditors, and entire and complete jurisdiction over the settlement and adjustments of all the claims and demands above mentioned was vested in these officers.

This system of settling public accounts has been in operation from 1817 to the present time.

The act provided for no appeal to, or revision by, the Secretary of the Treasury, or the head of any Department in which the claim originated, and it is evident from the language used that the final decision by these officers was to be conclusive, except by a resort to Congress or the courts.

The committee are satisfied that it was the intention of the framers of the act of 1817 to establish a tribunal for the settlement and adjustment of accounts against the Government that should be wholly independent of, and in no way subject to, control or revision by those Departments or officers by whom the public expenditures and liabilities are incurred.

The special provisions of many subsequent acts show that such was the understanding of Congress. The leading principle upon which this system of accounting and adjustment was established appears to have been that all accounts involving the expenditure and disbursement of public moneys should be settled and adjusted by officers holding under appointments independent of the heads of Departments, and who, themselves, had nothing to do with the disbursements. In short, they designed to prevent officers who made or directed the expenditure from having any voice or influence in judging of the legality or rightfulness of it, and such check was necessary to insure a judicious and honest expenditure of the public funds.

As a general rule, this interpretation of the act of 1817 has prevailed ever since its passage. We do not find that it has ever been questioned by anybody except the War

Department. There has been an occasional restiveness in that Department at being subjected to the decision of these accounting officers upon accounts arising in the Quartermaster General's Office.

As early as 1823 the question was raised as to the conclusiveness of an adjudication by the accounting officers of the Treasury Department upon an account arising in the Quartermaster's Department, and the question was referred to Mr. Wirt, then Attorney General. The whole subject was fully and exhaustively considered by him in an elaborate opinion, and the conclusion reached that the adjudication of claims by the accounting officers of the Treasury was final and conclusive, and binding upon all the Executive Departments of the Government.

In several subsequent opinions of Mr. Wirt the same views were reiterated.

During the Attorney-Generalship of Mr. Berrien the same question was again started, whether the decision of the accounting officers was binding upon claims originating in the Quartermaster's Department.

Mr. Berrien took a different view of the subject from Mr. Wirt, and held that such adjudications were not conclusive, but that they might be reopened and revised by the Secretary of War. Subsequent Attorneys General have had occasion to give opinions on the same subject.

The late Chief Justice Taney and Mr. Crittenden concurred in the views expressed by Mr. Wirt, while others took the same ground with Mr. Berrien.

The view of Mr. Berrien and those who have agreed with him were based mainly upon the relative rank and position of those accounting officers with the head of a De-

partment, and the seeming incongruity that the head of a Department should be bound by the decision of a subordinate, and especially a subordinate in another Department. It was also urged that, as it was the duty of the head of the Department to issue his warrant or requisition for the money found due, he must, therefore, have the power to examine and satisfy himself that the money is justly due, otherwise he is reduced to a mere machine. This line of argument seems to the committee wholly inconclusive and unsound. Congress may by law devolve such powers and duties as they choose upon public officers of any rank, and when they have done so, without giving either expressly or by implication a power of revision or control to another, their action is as conclusive upon those above as those below them in dignity of position. It is the command of the law, not the command of an inferior officer, which the superior is bound to obey. The decision of the most inferior magistrate, within his jurisdiction, is binding upon the highest officers and tribunals in the land, unless the law gives them power to revise and control his decision.

It appears to the committee that this assumption of power in the head of the War or any other Department to set aside and change the findings of the accounting officers of the Government is at war with the whole principle upon which the system is based; that the allowance and settlement of the disbursement of all public funds should be vested wholly in a set of officers other and different from those who made the expenditure. If their allowances and settlements can be set aside and changed by the head of the Department under whose direction the money was paid, or the claim accrued, then

the whole system of checks to improper expenditure, which it was supposed had been established, falls to the ground.

Aside from this consideration, the committee believe that the just rights of the Government itself, as well as the rights of claimants against the Government, are much more likely to be preserved, by being subject to the examination and adjudication of experienced men accustomed to examining accounts and weighing evidence, than they would be if subject to revisal and reversal by the action of subordinates in another Department, selected with no view to qualifications of this character.

Notwithstanding the diversity of opinion above alluded to, as to the conclusive quality of the adjustments made by the Auditors and Comptrollers in the Treasury, they were generally acquiesced in, and no very serious question of jurisdiction arose until within the last two or three years. The late war made the expenditures in the Quartermaster's Department many times greater than ever before, and of course as variable in circumstances as they were large in amount. It then began to be stoutly insisted in that Department that claims arising thereunder should be settled in that Department, and that they were not bound by the decisions of the accounting officers of the Government. The number of cases involved in this controversy was so great that the matter was brought to the attention of Congress, and after a very full and careful consideration of the subject it resulted in the passage of the act of March 30, 1868.

The committee do not regard that act as having added at all to the conclusiveness of the decisions made by the accounting officers

of the Treasury beyond what it was under the act of 1817. The only substantial change made by that act was the power given to the head of a Department doubting the correctness of any balance certified to him by such officers to return it for reexamination with any evidence in his possession bearing upon the subject.

It is suggested in the letter of the Secretary that his Department is embarrassed in asking for appropriations by reason of their want of knowledge of the amounts needed for the payment of claims upon it, if the amount is to be fixed by officers of another Department. It is impossible for the committee to see much force in the suggestion. If the estimates are made in advance of the settlement of the claims to this extent, they must be wholly uncertain, by whomsoever they are to be settled, unless the estimate is to furnish arbitrary rule for settlement, which would be unjust. If the estimates are made after settlement there is no uncertainty in either mode of settlement. But if it be true that under this mode of settlement the Department has made underestimates, so that they are not in possession of funds for the payment of claims allowed, the hardship would seem to be upon the claimants, whose payments must be delayed until the Department is in funds.

It is suggested by the Secretary in his letter that in case of disagreement between the accounting officers in the Treasury and the War Department as to the allowance of a claim, the claimant might be sent to the Court of Claims for the balance or the whole of his claim, as the case might be.

Section 7 of an act passed June 25, 1868, seems to provide all that the Secretary de-

sires in this behalf by authorizing the head of any Executive Department, when any claim is made upon his Department and the amount in controversy exceeds $3,000, and in other cases where the questions involved are important, to send such claimant to the Court of Claims.

In the judgment of the committee the present system of public accounting (which has worked so satisfactorily with few interruptions for more than half a century) ought not to be disturbed, and that the act of March 30, 1868, which was designed to prevent such interruptions in the future, was just and wise, and that no necessity exists for its repeal or modification.

* * * * *

The Committee Report on the cited provisions enacted as a part of sections 7 and 8 of the act of July 31, 1894 (Senate Report No. 293, 53rd Congress, 2nd Session, of April 2, 1894, to accompany S. 1831) contains the following explanation:

> Above the six Auditors is placed one Comptroller * * * *mainly to determine finally the construction of statutes* * * *.
>
> *The advantage of having one Comptroller* to stand in the same relation to the Auditors as an appellate court to inferior courts * * * *to make final decisions as to construction of statutes,* is so clear that it requires no argument * * *. Under the system proposed there will be uniform constructions of statutes in the accounting branch of the Government, and the fact that one officer is charged with this judicial duty, and relieved from mere mathematical computations, will be likely to lead to more satisfactory results.

* * * * *

This section also provides that *an Auditor* in passing an account, *having occasion to pass upon a construction of a statute which has not already been construed, or in changing the construction of a statute which has already been passed upon, shall send his decision upon such original construction to the Comptroller* * * *. *This clause is intended to provide the opportunity of presenting to the Comptroller, for his decision, all matters of a legal nature* or matters of importance. * * *

The same section also provides that disbursing officers or heads of the Executive Departments may obtain the decision of the Comptroller upon any question involving a payment to be made by them, which will bind the Auditors and the Comptroller in passing upon the account containing such disbursement. This is intended as a measure of relief for disbursing officers, and also to allow the Executive Departments to know what the action of the Comptroller will be before an expense is incurred by them. (Italics supplied.)

The purposes of the cited provisions of the Budget and Accounting Act are explained in the Senate Report No. 524, 66th Congress, 2nd Session, of April 13, 1920, as follows:

[Senate Report No. 524, 66th Congress, 2d Session]

NATIONAL BUDGET SYSTEM

APRIL 13, 1920.—Ordered to be printed.

Mr. McCormick, from the Special Committee on the National Budget, submitted the following report (To accompany H.R. 9783):

* * * The Comptroller of the Treasury bears an appellate relationship to the six auditors. He reviews, on appeal, settlements made by them in the first instance, and modifies and revises such settlements *in his discretion. He renders advance decisions at the request of disbursing officers and heads of departments and establishments on the applicability of appropriations to specific purposes and on other matters relating to the expenditure of public funds.*

WANT OF COORDINATION

* * * * *

If new provisions are to be made for the accounting establishment of the United States at this or any other time, they should accomplished [sic] a concentration of authority over all Federal accounting activities. * * * They should require this official to keep the Government's books of general accounts of appropriations and funds, of revenues and expenditures, of the public debt, and [illegible] fiscal officers. And they should provide for advance decisions to fiscal officers and to heads of departments, and for the review upon appeal of the settlement of accounts and claims made in routine order. * * *

[House of Representatives Report No. 14, 67th Congress, 1st Session]

NATIONAL BUDGET SYSTEM

APRIL 25, 1921—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. Good, from the Select Committee on the Budget, submitted the following report (To Accompany H.R. 30): The Select Committee on the Budget, to which was referred

H.R. 30, report it to the House with a favorable recommendation and submit the following explanation thereof:

* * * * *

The bill creates an independent establishment known as the general accounting office, to which is transferred all the powers and duties now imposed by law upon the Comptroller of the Treasury and the six auditors. The Comptroller of the Treasury and the six auditors under existing law are appointed by the President. Under the present plan the Congress has no power or control over appropriations after they have once been made. It has no knowledge as to how expenditures are made under these appropriations, and inasmuch as the Comptroller of the Treasury and the six auditors owe their appointment to the President, they could not hope to hold their positions if they criticized wastefulness or extravagance or inefficiency in any of the departments. The Executive having the power to initiate the budget, certainly an independent audit is necessary to insure at all times a businesslike execution of the budget.

* * * * * *

The only way by which Congress can hold a check on expenditures is to continue a control and audit of the accounts by an independent establishment. The tenure in office of the comptroller general and the assistant comptroller general is made * * * to secure competent men to occupy the positions and *to make them absolutely independent of the Executive in their decisions. The position is a semijudicial one,* * * *. The creation of this office will enable it to furnish information to Congress and to its committees regarding the expenditures of

the Government. He could and would be expected to criticize extravagance, duplications, and inefficiency in executive departments. He could do this without fear of removal. Under the present plan neither the Comptroller of the Treasury nor the six auditors make such criticism. The reasons why they do not are apparent, yet opportunities for wholesome criticism abound in every department. The creation of this office will, it is seen, serve as a check, not only on useless expenditures but will keep the bureau more keenly alive to a rigid performance of its duties and obligations. It has been urged by some as the most important forward step in the process of wise budgetary reform. (Italics supplied.)

A-40048

APPENDIX B

COMPTROLLER GENERAL OF THE UNITED STATES,
Washington, September 14, 1933.

The Honorable THE ATTORNEY GENERAL.

In re *Miguel* v. *McCarl, etc., et al.*, Petition for Writ of Certiorari to the Court of Appeals of the District of Columbia, No. 435 in the Supreme Court of the United States.

SIR: There was received by this office September 9, 1933, a copy of the petition above designated stated by counsel for petitioner to have been filed in the Supreme Court of the United States on September 6, 1933, and a copy thereof served upon the Solicitor General of the United States on September 7, 1933. The printed record and briefs filed in the Court of Appeals of the District of Columbia have been furnished to your department

by this office in connection with preparation of the case for trial in that court. (Letter A-40048 to you of April 18, 1933, etc.) The present case now is in a status analogous to that covered by my letter to your department, A-37792, of January 23, 1933, involving the preparation of a brief in opposition to the petition for writ of certiorari, and, as was done in that case, this office, upon request, will be pleased to assign counsel to aid and assist counsel in your department in the preparation of such a brief.

It appears the petition and brief which have been filed are defective in that they do not make a clear, definite, and complete disclosure concerning the controversy arising on the record and contain no concise statement of the special and important reasons on the basis of which the jurisdiction of the Supreme Court of the United States is invoked. Revised Rules of the Supreme Court of the United States 26, 27, and 38, paragraphs 2 and 5 (*c*).

Counsel for the petitioner at page 2 of the petition states that the questions presented are as follows:

> 1. Has the Comptroller General of the United States jurisdiction to review the order of the President acting through the Secretary of War, retiring with pay, after thirty years' service as an enlisted man of the United States Army, a Philippine Scout enlisted in the Army under section 36 of the act of February 2, 1901, 31 Stat. 757?
>
> 2. If the Comptroller General has jurisdiction to review such order of the President, is the right of an enlisted man of the Philippine Scouts, after thirty years' service, to retirement with pay so clear as to render the

decision *contra* of the Comptroller General subject to correction by mandatory injunction?

These are the questions which counsel for the petitioner and representatives of the War Department, appearing *amici curiae* (so stated) in copious briefs and by extended oral argument in both lower courts, indicated it to be their desire to have decided but the facts established on the record do not present any such questions for decision and the findings and opinions delivered both in the Supreme Court of the District of Columbia and in the Court of Appeals are conclusive that no such questions are for decision in the present case. Counsel from the War Department filed a brief in the Court of Appeals of the District of Columbia of 237 printed pages printed at the Government Printing Office at a cost of $531.66 and were allowed to argue *in extenso* by way of supporting such printed brief that such questions were involved and counsel for petitioner likewise argued orally and in printed brief that such were the questions.

The Court of Appeals heard said counsel patiently and after careful consideration unanimously rendered the opinion of June 26, 1933, entirely repudiating the contentions of counsel for petitioner and from the War Department and sustaining in every particular the position set forth in briefs filed on behalf of the Government, particularly the printed brief prepared by counsel in this office by direction of the Solicitor General and filed in the Court of Appeals of the District of Columbia. That brief, copies of which already have been furnished

your department, and the very able and comprehensive opinion rendered by the Court of Appeals (Published 61 Wash. Law Rep. 637–638, of which copy inclosed), doubtless contain the data your department will require for the preparation of a brief in opposition to the petition. The questions actually arising on the record have been settled repeatedly by the Supreme Court as well as by both of the lower courts and—aside from the precedents cited in Government's appeal brief—section 267 of the Judicial Code, act March 3, 1911, 36 Stat. 1163 (28 U.S.C. 384), required a dismissal of the bill. *Hurley* v. *Shanley* (D.C.App.), 60 F. (2d) 335; *Hurley et al.* v. *Kincaid*, 285 U.S. 95; *United States* v. *Lynch*, 137 U.S. 280; *United States* v. *Guthrie*, 17 How. 284; *Decatur* v. *Paulding*, 14 Pet. 497; *Brashear* v. *Mason*, 6 How. 92.

The brief filed by the petitioner is devoted to a discussion of questions which are not in the case and, accordingly, seems to require no particular attention. All of the cases cited on behalf of the petitioner were brought to the attention of the Court of Appeals of the District of Columbia. Cases such as the *Jones*, 18 How. 92, and *Billings*, 23 Ct. Cls. 166, cases, to which the United States was a party, have no application in a suit for mandamus or injunction in which the merits of the claim involved as against the United States, are not for consideration. What has been sought in this case by present and former officers of the Army is a method of controlling the uses and disposition of public moneys through military fiats and the injunctive process so as to nullify and frustrate the constitutional control over the public moneys now

exercised by the legislative branch of the Government through appropriation acts and the duly constituted accounting officers. It was due to just such efforts, emanating principally from the War Department, that the decision of the accounting officers was made conclusive on the executive branch respecting the availability of appropriated moneys, in the absence of a specific statute making administrative determination of status conclusive of right to payment. In re Departmental Reference No. 167, 59 Ct. Cls. 813; Government's Appeal Brief, pp. 22–36, 81–93.

Aside from the fact that it was decided no appropriation had been made in the present case to pay the claim presented, the doubt arising respecting whether the status administratively fixed was authorized by law required reserving the question for judicial decision, in a suit against the United States, where the legal merits of the petitioner's status might be freely examined unhampered by any contentions as to finality of an act of command. The argument which has been made at such great length on behalf of the petitioner in the pending proceedings that the mere administrative retirement of military personnel fixes conclusively the right to pay as against the United States, is of course frivolous; an overwhelming array of precedents having settled that a right to pay in the status administratively determined can only arise when such status is established to be authorized by statutory law, the mere administrative action in that respect being in no wise final in the absence of a specific statute making it so, which is not the present case. *Cloud* v. *United States,* 43 Ct. Cls.

69; *Montgomery* v. *United States,* 19 Ct. Cls. 370; *Jasper* v. *United States,* 38 *id.* 202, 205; *Downes* v. *United States,* 52 *id.* 237, 239; *Hooper* v. *United States,* 53 *id.* 90, 106; *United States* v. *Corson,* 114 U.S. 619; *Mimmack* v. *United States,* 97 U.S. 426; *McElrath* v. *United States,* 102 U.S. 426; *Blake* v. *United States,* 103 U.S. 227; *United States* v. *Symonds,* 120 U.S. 46; *United States* v. *Perkins,* 116 U.S. 483; *United States* v. *Barnette,* 165 U.S. 174; *United States* v. *Allen,* 261 U.S. 317, 320, affirming 56 Ct. Cls. 265. It is not for the Government accounting officers, by allowing payment in cases of doubtful status, to preclude the Government from an opportunity to have the legal merits inquired into judicially. *Mullet* v. *United States,* 21 Ct. Cls. 485; *Charles* v. *United States,* 19 *id.* 316; *Longwill* v. *United States,* 17 *id.* 288, 291–292.

The statement at page 7 of the petition that "Petitioner, Santos Miguel, first enlisted October 1, 1901, in the United States Army" is contrary to the facts established on the record and otherwise is entirely incorrect and misleading. Santos Miguel not only did not enlist in the United States Army in 1901, or subsequently, but his enlistment in the United States Army was specifically forbidden by statutory law and were his claim properly for consideration on the merits in the pending proceeding a judicial decision that the claim of petitioner, aside from any question of availability of an appropriation to pay, is without any legal merit as against the United States, would be unavoidable. In addition to what is said in that connection in the decision on Miguel's claim voucher, 11 Comp. Gen. 275, and in the report to your department,

A-40048 of August 6, 1932, relative to the case of *Santos Miguel* v. *United States*, Ct. Cls. No. 169, Departmental, the point is covered in the letter A-19023/A-24954/A-40048 to you of August 21, 1933, involving the substantially analogous case of Andres Rimorin, as follows:

> By its letter dated March 2, 1933, the Veterans' Administration requested this office to collect from Andres Rimorin, San Fernando, La Union, Philippine Islands, the net balance due the United States on a loan of $110 advanced to him June 22, 1927, on United States Treasurer's check (Veterans' Bureau No. 627) drawn by Joseph F. Routhier, special disbursing agent, on the security of an adjusted service certificate which had been issued to Rimorin through error.
>
> The report is, in pertinent part, as follows:
>
> "1. Under the provisions of Section 305 of the Act approved June 10, 1921, 42 Stat. 24, report of indebtedness is hereby made in the following case, the Bureau having exhausted all usual means of effecting collections:
>
> "2. Person indebted: Rimorin, Andres; present whereabouts: San Fernando, La Union, Philippine Islands.
>
> "3. Identification numbers: A-3,525,522 Cert.-2,743,595
>
> * * * * *
>
> "Upon the certification of this Administration by the War Department of an adjusted service credit in the amount of $500.00, Adjusted Service Certificate #2,743,595, dated February 1, 1925, amount $1,256.00 was issued to Andres Rimorin, A-3,525,522.

He subsequently obtained a loan of $110.00 from the Manila, Philippine Islands Office on the security of the Adjusted Service Certificate, paid by check-voucher #627, dated June 22, 1927, drawn by Joseph F. Routhier, Disbursing Clerk, symbol #99207. *On July 30, 1928, the Adjutant General, War Department, advised that the application for adjusted compensation submitted by the veteran should have been disallowed as he served as a Philippine Scout during the World War, and as such would not be entitled to any benefits under the provisions of the World War Adjusted Compensation Act as amended.*" * * .* (Italics supplied.)

* * * * *

The adjusted service compensation certificate issued to Rimorin was absolutely void by reason that the man's only service appears to have been as an enlisted man in the provisional organization of natives authorized under section 36 of the act of February 2, 1901, 31 Stat. 757, to be organized as Scouts.

It was settled in *Downes* v. *Bidwell*, 182 U.S. 244; *Dorr* v. *United States*, 195 U.S. 138; and in *Balzac* v. *Puerto Rico*, 258 U.S. 298, that the territory constituting the Philippine Islands has not been incorporated in the union or become a part of the United States, as distinguished from merely belonging to it, and that the provisions of the Constitution of the United States and of the general statutes do not apply of their own force to such territory or to the natives thereof unless made applicable by specific language in the statutes (36 Op. Atty. Gen. 170, 172). In recognition of this rule the members of the organization of Philippine Scouts were held exempt from the provisions

of the National Defense Act and of the Selective Draft Act. (27 Comp. Dec. 88; Op. J.A.G. of the Army 322.62 January 3, 1918—Dig. Ops. J.A.G. January 1918, p. 4.). In Treasury Decision No. 31, War Risk, of August 21, 1918, it was held that "neither the *Philippine Scouts* nor the insular force of the Navy, nor the Samoan native guard and band of the Navy, nor any member of either of said organizations, were or are included in, or covered by the War Risk Insurance Act or any part thereof, nor were they intended so to be by the Congress." (Italics supplied.)

The act of July 19, 1919, 41 Stat. 222, made broad provisions for the naturalization, etc., of persons of foreign birth who had served in the military or naval forces of the United States but in decision of May 25, 1925, in the case of *Toyota* v. *United States,* 268 U.S. 402, denying naturalization under the act to Japanese who had been serving in the Coast Guard, upon the ground that this statute applied only to white persons and Africans, the Supreme Court of the United States said that the act of 1919 likewise did not admit of the naturalization of Filipinos. To the same effect is the holding by the U.S. District Court of the Eastern District of Pennsylvania (*In re Alverto,* 198 F. 688) that a citizen of the Philippine Islands who ethnologically was one-fourth white and three-fourths brown or malay could not be naturalized, and the cases of *In re Lampitoe,* D.C. S.D. N.Y., 232 F. 382; *In re Rallos,* D.C. E.D. N.Y., 241 F. 686; *In re Ocampo,* 4 U.S. D.C. Hawaii 686 and 770.

The enlistment of native citizens of the Philippine Islands in the United States Army has been forbidden by section 2 of

the act of August 1, 1894, 28 Stat. 216, which is set forth in 10 U.S.C. 623, as follows:

"In time of peace no person (except an Indian) who is not a citizen of the United States, or who has not made legal declaration of his intentions to become a citizen of the United States, shall be enlisted for the first enlistment in the Army."

Citizens of the then unincorporated territory of Puerto Rico were declared eligible for enlistment in the Regular Army by the act of March 2, 1903, 32 Stat. 934 (10 U.S.C. 626) but no such provision modifying the prohibition of the cited 1894 act on enlistment in the Army ever was made with respect to native Filipinos such as compose the enlisted force of native scouts.

Thus, not only was the Adjusted Compensation Act not applicable to enlisted members of the native provisional organizations of Philippine Scouts, in the absence of specific language, but the act itself (43 Stat. 122) absolutely forbade the allowing of credit for such service, as follows:

SEC. 202. In computing the adjusted service credit no allowance shall be made to * * *

* * * * *

"(c) Any civilian officer or employee of any branch of the military or naval forces * * * *Philippine Scout*, member of the Philippine Guard, member of the Philippine constabulary * * * member of the insular force of the Navy * * * or Indian Scout [although enlistment of Indian Scouts in Army of the United States not prohibited by cited section 2 of the act of August 1, 1894] in each case for the period of service as such.". (Italics supplied.)

This office will be pleased to render at your request, any further assistance within its means.

In reference to your letter of September 13, 1933, which just now has been received, requesting to be advised of my attitude in the matter of opposition to the petition which has been filed, the statement herein contained is believed to show conclusively that a plain duty lies on the part of all officers of the United States to support the opinion of the Court of Appeals as a correct construction of the law. I would ask the personal consideration of you and the Solicitor General and that you will cause a brief in opposition to the petition to be filed; otherwise that you will promptly advise me in the premises.

Respectfully,

J. R. McCARL,
Comptroller General of the United States.

Inclosure.

COMPTROLLER GENERAL OF THE UNITED STATES,
Washington, September 21, 1933.

A-40048.

The Honorable, The ATTORNEY GENERAL.

SIR: There have been received your letters of September 13, 1933, and September 16, 1933, relative to the case of *Miguel* v. *McCarl et al.* (No. 435 in the Supreme Court of the United States), wherein you state that it will be satisfactory to you if I shall cause a brief to be filed in opposition to the petition for a writ of certiorari which has been filed on behalf of the petitioner, Miguel. Your letters state your purpose as being to advise the court your views accord with the claims of the plaintiff

and against those of the officials of the United States upon whom is the duty of deciding the availability of appropriations of the public moneys. It seems essential that the interests and rights of the United States, as well as of this office should be presented impartially to the court in this case and I have assigned to counsel of this office the preparing such brief as may seem appropriate upon receipt from your department of the printed record and of a copy of whatever statement may be filed with the court by your department.

The clerk of the Supreme Court of the United States has advised counsel of this office that in view of the condition of the docket, the matter of the *Miguel* petition will not be for consideration by the court within a month although the time for filing a brief in opposition to the petition will expire on September 27, 1933. The short brief which this office contemplates can be ready for printing within 5 days or less after the receipt of the printed record and statement from your department, and if, at the same time, you will furnish this office with an authorization to have the brief printed at the Government Printing Office under the Department of Justice appropriation involved, it would seem the brief should be ready for filing within about ten or twelve days after receipt of the printed record and statement of the Department of Justice. I would request further that appropriate arrangements as to extension of time for filing the brief in opposition be made under your department and that you will promptly advise me in the premises.

Respectfully,

J. R. McCARL,
Comptroller General of the United States.

Appendix C

Department of Justice,
Office of the Attorney General,
Washington, D.C., September 16, 1933.

The Honorable the Comptroller General
of the United States, *Washington, D.C.*

Sir: Your letter of September 14, 1933, setting forth your attitude in the matter of the petition for a writ of certiorari in the case of *Miguel* v. *McCarl et al* (No. 435 in the Supreme Court of the United States), has been received.

In view of the last paragraph of your letter, I have the honor to inform you that this case has received the personal and earnest attention of both the Solicitor General and myself; and while I regret that our views are not at one with your own as to the merits of the petition, I feel it necessary to state that it is the duty of this Department, as it has always been the practice, to advise the Supreme Court of its convictions regarding the merits and the law applicable to any petition for certiorari submitted.

In view of the course this Department feels constrained to follow, as indicated in our former letter, it will be perfectly satisfactory if you should cause to be filed a brief setting forth your contentions and opposing the granting of the writ.

Respectfully,

Homer Cummings,
Attorney General.

DEPARTMENT OF JUSTICE,
OFFICE OF THE SOLICITOR GENERAL,
Washington, September 21, 1932.

Honorable J. R. MCCARL,
Comptroller General of the United States,
Washington, D.C.

(In re *Miguel* v. *McCarl,* No. 435, October Term, 1933.)

DEAR MR. COMPTROLLER GENERAL: Your letter of September 21st addressed to the Attorney General has been referred to me. I enclose herewith a carbon copy of the statement which I expect to file with the Supreme Court. I also enclose a requisition for the printing of your brief.

I have arranged with counsel for the petitioner that you may have ten days' additional time for filing your brief. This time will expire on October 7th. From your letter I gather that your brief can readily be prepared by that time.

No copy of the printed record is available which can be sent to your office. However, I presume that you already have copies of the record as used in the Court of Appeals. The record in the Supreme Court consists simply of this record, together with the opinion of the Court of Appeals, the judgment and one or two formal matters. It is possible that you may be able to obtain an additional copy of the record from the Clerk of the Supreme Court or from the petitioner's counsel.

Very truly yours,

J. CRAWFORD BIGGS,
Solicitor General.

U. S. GOVERNMENT PRINTING OFFICE: 1933